cases which have regarded the rule as well settled, a dissenting opinion was filed by Mr. Justice Holmes, with whom concurred Mr. Justice Lurton and Mr. Justice Hughes, in the case under comment. The author of the dissenting opinion urges that, "No statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations which would be let in to hang a man," and that since "the rules of evidence in the main are based on experience, logic and common sense," there is no reason why a rule in conflict with all of these should not be repudiated. The opinion of the dissenting justices is in sympathy with the modern tendency to look to the living principles of the law of evidence rather than to the rules of thumb in which courts have attempted to state the principles in some of their applications. It supports Professor Wigmore's protest against the limitation of the exception to proprietary or pecuniary interest, which he characterizes as a "barbarous doctrine."[4]

The answer of the majority to Mr. Justice Holmes' view is stated in a quotation from Chief Justice Marshall. "Hearsay evidence is in its own nature inadmissible. . . . . The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule."[5] But a statement of the dangers of hearsay does not touch the essential contention of the dissenting judges. Underlying all exceptions to the hearsay rule are two elements,—necessity and a guaranty of trustworthiness.[6] In the case at bar the necessity is found in the death of the declarant; the guaranty of trustworthiness in the fact that the confession of the murder subjected the declarant to criminal liability. In indiscriminately rejecting the "confession of the avowed culprit," the limitation of the rule in its practical results will frequently work injustice. The dissenting opinion is significant in pointing out the necessity and importance of looking to the broad and fundamental principles of exclusion and admission.

C. S. J.

Executors and Administrators: Right of Non-Resident Executor to Nominate.—The question of the right of the probate court to grant letters of administration to the nominee of a non-resident executor in preference to the public administrator, has been one of no little uncertainty and confusion in view both of the sections of the Code of Civil

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[4] 2 Wigmore on Evidence, secs. 1476, 1477.

[5] Queen v. Hepburn, (1813) 7 Cranch 290.

[6] 2 Wigmore on Evidence, secs. 1420-1423.

Procedure and of the decisions of the Supreme Court involving the point. In a recent decision in bank,[1] following a prior contrary holding in department,[2] six justices concurred in a carefully considered opinion, aimed to settle definitely the law as to the matter in this state. The court concludes that "The executor named in the will, as such, is not authorized to nominate an administrator, and any attempted nomination by him is ineffectual for any purpose." The court thus reaches a result similar to that attained in two early California cases,[3] and expressly repudiates the contrary decision in one[4] and the dictum in another case,[5] both made subsequent to these earlier decisions but apparently without consideration of them.

The difficulty presented by the question which is the subject of the present case apparently arises through the provisions of section 1379 of the Code of Civil Procedure. It is there placed in the discretion of the court to grant administration to any competent person, though not otherwise entitled, at the request of the person so entitled. Is a non-resident executor "the person so entitled?" The question might seem to be further complicated by the additional provision of section 1379 which states that "when the person entitled is a non-resident of the state," affidavits may be used to prove his identity. How can this provision be reconciled with section 1369 which provides that no person is competent or entitled to letters of administration who is not a bona fide resident of the state? If a non-resident cannot have letters of administration in any case, what need to prove his identity by affidavit or otherwise? The truth is that the latter portion of section 1379 was repealed by implication when section 1369 was amended in 1877 so as to make, for the first time, non-residence a disqualification. The problem caused by these conflicting provisions seems to have been raised in one of the earlier cases,[6] and was there disposed of by the holding that this designation of a means for identifying a non-resident entitled to letters of administration was a provision for a contingency which as yet could not exist,—the contingency that the statutory disqualification of a non-resident should be removed. Apparently it escaped the notice of the court that the disqualification of a non-resident had been added by an amendment to section 1369, made subsequently to the enactment of section 1379. It is also of interest to note that this portion of section 1379 was retained in the attempted amendments of 1901, where that section, though repealed, was re-enacted as section 1367.[7]

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[1] Estate of Meier (May 17, 1913) 45 Cal. Dec. 610.

[2] (Feb. 24, 1913) 45 Cal. Dec. 273.

[3] Estate of Beech, (1883) 63 Cal. 458; In re Garber, (1887) 74 Cal. 338.

[4] Estate of Harrison, (1901) 135 Cal. 7, 66 Pac. 846.

[5] Estate of Brundage, (1904) 141 Cal. 538, 75 Pac. 175.

[6] Estate of Beech, (supra).

[7] Stats. 1901, p. 204.

To consider the first portion of section 1379 only, then, is a non-resident executor "the person so entitled?" Very evidently one named in the will as executor is not entitled, as such, to letters of administration, except in so far as is any person who is legally competent. An executor is entitled to letters testamentary, but section 1379 speaks of administration only, and by this must be taken to mean letters of administration, not letters testamentary. An executor, then, as such, could not be entitled to letters of administration as against the public administrator, to whom the code requires preference to be given over one who is merely a "person legally competent." [8] The fact that the will is a foreign will and the executor a non-resident, can produce no different result. Except as modified by conflicting provisions in sections 1322-1324 of the Code of Civil Procedure dealing with foreign wills, there is no reason to suppose that the general provisions as to matters of probate do not govern in the case of a foreign will equally as in the case of a domestic will.[9] Since the executor is a non-resident, he would not, even in the event that no one opposed him, be entitled to letters of administration (as distinguished from letters testamentary) in view of the provisions of section 1369. The nominee of a non-resident executor, therefore, may not be preferred to the public administrator in granting letters of administration, inasmuch as an executor is not entitled as against the public administrator to letters of administration, and, if a non-resident, is not entitled to letters of administration at all.

W. W. F., Jr.

Libel: Malice.—The question of malice will probably never cease from troubling. The courts centuries ago raised a ghost that will never be laid. Some of the great intellects of the bench, such, for instance, as Justice Bayley,[1] Lord Esher,[2] and Lord Herschell,[3] have endeavored, with penetrating insight and perspicuous phrase, to make the meaning and application of malice simple and unambiguous, but all to no avail as against the proneness of the average human mind to wander into the inviting shades of error. Justice Henshaw did two years ago for California,[4] the service that has been done before for England, in fully, clearly and explicitly expounding the part that malice plays in the law of libel. There no longer seems any excuse for either trial judge or appellate court to go wrong in thir rulings on this subject.

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[8] California Code of Civil Procedure, sec. 1365.

[9] Estate of Meier, (supra); Estate of Coan, (1901) 132 Cal 401, 64 Pac. 691; Estate of Rankin, (1912) 44 Cal. Dec. 553, 127 Pac. 1034.

[1] Bromage v. Prosser, (1825) 4 B. & C. 247.

[2] Clark v. Molyneux, (1877) 3 Q. B. D. 237.

[3] Allen v. Flood, (1898) A. C. 1.

[4] Davis v. Hearst, (1911) 160 Cal. 143, 116 Pac. 530.